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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

PEAT MANUFACTURING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 9, 1982

QUESTIONS PRESENTED

1. Whether the finding of a violation of the National Labor Relations Act ("NLRA") which was never alleged in nor amended into the complaint nor litigated at the hearing, and therefore was not in issue, violates petitioner's due process rights guaranteed by the Fifth Amendment.

2. Whether the court of appeal's conclusional decision (finding a threat), which conflicts with other courts of appeals' decisions in cases involving substantially the same facts, violates petitioner's, and potentially all employers', First Amendment free speech rights to apprise employees as to statements made during collective bargaining negotiations about replacement of strikers.

3. Whether the decision below is so grossly erroneous as to result in a miscarriage of justice which could affect all employees' Constitutional and statutory rights (not) to assemble or associate in the future.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

PEAT MANUFACTURING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Peat Manufacturing Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 22, 1982.

OPINION BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit appears in the appendix hereto as Exhibit "1".

The decision and order of the National Labor Relations Board (hereinafter alternatively referred to as the "Board" or "respondent"), reported at 251 NLRB No. 153, appears in the appendix hereto as Exhibit "2". The judgment of the Court of Appeals for the Ninth Circuit appears as Exhibit "3" and the court of appeals' order denying the petition for rehearing appears as Exhibit "4" in the appendix hereto.

JURISDICTION

The memorandum opinion of the court of appeals was entered on February 16, 1982. A timely petition for rehearing was denied on April 13, 1982. This petition for certiorari was filed within 90 days of April 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the finding of a violation of the National Labor Relations Act ("NLRA") which was never alleged in the

complaint nor litigated at the hearing, and therefore was not in issue, violates petitioner's due process rights guaranteed by the Fifth Amendment.

2. Whether the court of appeals' decision, which conflicts with other courts of appeals' decisions in cases involving substantially the same facts, violates petitioner's, and potentially all employers', First Amendment free speech rights.

3. Whether the decision below is so grossly erroneous as to result in a miscarriage of justice which could affect all employees' rights in the future.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 157: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization in section 158(a) (3) of this title.

Section 158(c): The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

Peat Manufacturing Company (hereinafter alternatively referred to as "Peat" or "petitioner") is engaged in the manufacture and distribution of zinc and aluminum die casting and plastic injection molding. On May 19, 1977, a representation election was conducted at Peat's facility under the supervision of the Board's Region 21. On September 15, 1977, the Board certified Produce, Refrigerated and Processed Foods and Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") as collective bargaining representative for Peat's production and maintenance employees. Thereafter, representatives of Peat and the Union met on many occasions to negotiate a collective bargaining agreement.

In response to numerous employee

requests for information about the negotiation sessions, Peat's general manager, Bob Murphy, met with the employees on two occasions in June 1978. These meetings were held for the sole purpose of informing the employees about the status of the negotiations. Murphy described the proposals which had been presented by Peat to the Union at the bargaining table. Murphy's remarks were translated for the Spanish-speaking employees.

One month later, in July 1978, a petition to decertify the Union as the employees' collective bargaining representative was initiated by and circulated among the employees. A majority of the employees signed the petition, evidencing their lack of support for the Union. A copy of this petition was given to Murphy. In September 1978, more than one year after the certification date, a second petition was initiated by and

circulated among the employees. A majority of the employees also signed this petition to "throw the Union out of Peat". On September 21, 1978, this petition was given to Murphy by the employees. After verifying the authenticity of the signatures on the petition, Murphy met with the employees to inform them that he had received the petition and that Peat no longer recognized the Union as bargaining agent for the employees in accordance with the employees' wishes as twice expressed in the petitions. Thereafter, Peat refused to bargain with the Union.

The Union filed unfair labor practice charges against Peat. The Board's Region 21 thoroughly investigated the matter, found that the charges were unsubstantiated by any evidence and, by letter dated November 22, 1978 (Exhibit "5" in the appendix hereto) dismissed the matter in its entirety. The Union appealed this decision to

the Board's General Counsel. Although the regional office had conducted the investigation and been closest to the facts, the General Counsel contradicted the region's findings and issued a complaint. A hearing was held before the Board's Administrative Law Judge William J. Pannier III. On April 17, 1980, Judge Pannier issued his decision finding that Peat had committed a violation of the NLRA which had never been alleged in the complaint nor litigated at the hearing. This decision was routinely adopted by the Board and by memorandum opinion of the court of appeals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING FUNDAMENTAL DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Despite overwhelming evidence to the contrary, the Board found that petitioner violated the NLRA by threatening to discharge strikers in June 1978. However,

there was no complaint allegation or amendment concerning a threat to discharge strikers in June 1978 [1] nor was this matter litigated at the hearing and therefore was not properly before the Administrative Law Judge for resolution. The Board routinely adopted the findings of its Administrative Law Judge over petitioner's objections, and the court of appeals deferred to the Board's "expertise" by upholding the Board's decision.

The finding that an unfair labor practice occurred which was never alleged in the complaint nor litigated at the hearing is in direct conflict with the Court of Appeals for the Fifth Circuit's decision in Engineers and Fabricators, Inc. v. NLRB,

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1/ The only complaint allegation concerning any threat to discharge strikers specifically referred to September 21, 1978, which would not place petitioner on notice that a threat to discharge strikers in June had been charged and was to be litigated and, in fact, this matter was not charged nor litigated.

367 F. 2d 482 (5th Cir. 1967). In that case, the court refused to enforce the Board's finding of a violation which was neither charged in the complaint nor litigated at the hearing because to do so would offend fundamental concepts of procedural due process. The court stated that the purpose of the Board's complaint is "to notify the adverse party of claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." 376 F. 2d at 485 (citations omitted). Similarly, the Board's applicable regulation, 29 C.F.R. § 102.15, requires that: "The complaint shall contain ... a clear and concise description of the acts which are claimed to constitute unfair labor practices...."

Other courts of appeals have recognized that these fundamental due process requirements must be met in federal agency

adjudications. In J.C. Penny Co., Inc., v. NLRB, 384 F. 2d 479 (10th Cir. 1967), the court noted that: "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." 384 F. 2d at 483. These due process requirements were not met in the case at bar. The complaint allegation herein, that petitioner threatened to discharge strikers specifically on September 21, 1978, does not clearly and concisely describe the unfair labor pratice found by the Board, to wit: a threat to discharge strikers in June. Thus, the record does not support the contention that petitioner had notice that this matter was in issue.

Although the courts have recognized the Board's authority to decide an issue not specifically alleged in the complaint,

the issue must have been fully and fairly litigated by the parties. Soule Glass and Glazing Co. v. NLRB, 652 F. 2d 1055 (1st Cir. 1981). The test is whether the employer knew what conduct was in issue and had a fair opportunity to present his defense. 652 F. 2d at 1074.

In a complex and confusing case such as the instant one, which confusion was exacerbated by the numerous Spanish-speaking witnesses who required a translator at the hearing and whose testimony often consisted of inaccurate paraphrasing, it would be unfair to require petitioner to defend against endless possibilities of unfair labor practices. General Counsel could have easily amended the complaint to include another allegation, however this was never done. Thus, petitioner was never placed on notice that a threat to discharge strikers in June was in issue, and no defense was presented on this subject. If petitioner had been given such notice, the matter would have been fully

litigated and detailed evidence would have been presented. The one witness whose testimony touched on this matter would have been fully probed, and other witnesses would have been called. The prejudice to petitioner caused by the Board's ruling is obvious.

The petitioner's due process rights were further violated by the conduct of the Administrative Law Judge. Adjudications before the Board are based on "having a neutral, impartial trier of fact with the General Counsel serving as prosecutor. The ALJ may not, in effect, become a litigant by 'prosecuting' uncharged violations." Soule Glass and Glazing Co. v. NLRB. supra, 652 F. 2d at 1074. In NLRB v. Tamper, Inc., 522 F. 2d 781 (4th Cir. 1975), the Court of Appeals for the Fourth Circuit acknowledged that:

> While we do not doubt that the Administrative Law Judge in the exercise of his discretion may call attention to an uncharged violation which has been fully litigated by the parties, we do not believe he should under-

> take to decide an issue which he alone has injected into the hearing -- especially where, as here, the parties were never advised to litigate the issue. Once the Administrative Law Judge undertook the General Counsel's prosecutorial function by ferretting out evidence of uncharged violations and building a case against the defendant-employer he overstepped the permissible scope of his duties.

522 F. 2d at 789-790.

Like those cases, the case before the Court involves an Administrative Law Judge's finding of an unfair labor practice never alleged in nor amended into the complaint, which was not fully litigated at the hearing, and which neither party had notice was in issue. The court of appeals perpetuated the injustice to petitioner by deferring to the Board in its "rubber-stamping" of the Board's decision. The fact that the court's decision squarely conflicts with opinions of courts of appeals in other circuits and has resulted in a denial of petitioner's fundamental due process rights justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE EXERCISE OF THE RIGHT OF FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Administrative Law Judge, whose opinion was routinely adopted by the Board and the court of appeals, found that in June 1978 petitioner threatened to discharge strikers. This finding was based on the testimony of one Spanish-speaking witness who, in paraphrasing Murphy's remarks at the June meetings, recalled Murphy saying that strikers " were going to be replaced and that the people that took the jobs are going to have a job permanent...". Petitioner submits that the overwhelming weight of the evidence contradicts this finding in addition to the fact that this violation was never charged in the complaint nor litigated at the hearing. However, even assuming, arguendo, that Murphy did make this statement to the employees at the June meetings regarding negotiations with the

Union, the court's finding directly conflicts with the decisions of other courts of appeals which hold that statement is within the employer's First Amendment rights.

The employer's right to permanently replace economic strikers and to refuse to reinstate them if the replacements remain in their jobs is well established. NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 88 S. Ct. 543 (1967). The striker is then only entitled to an offer of reinstatement if a job for which he is qualified becomes available.

The Court of Appeals for the Second Circuit held that no threat occurred when an employer told its employees during a union organizing campaign that if they went on strike, they would be "replaced temporarily or in other circumstances they could be replaced permanently." NLRB v. Rollins Telecasting, Inc. 494 F. 2d 80 (2nd Cir. 1974), cert. denied, 419 U.S. 964, 95 S. Ct. 224 (1974). The court stated that

the employer was not responsible for delivering a lecture on the reinstatement rights of economic strikers and concluded that the "statement that economic strikers could lose their jobs 'temporarily or permanently' was within the protection of (NLRA) Section 8 (c)". 494 F. 2d at 82.

Similarly, the Court of Appeals for the First Circuit found that an employer's statement during a union organizing campaign that a number of people had lost their jobs during a previous strike was protected speech. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666 (1st Cir. 1979). The court in that case stated:

> That a union might call a strike, however, is a simple fact of life. So is the possibility that it may be unsuccessful. To state either cannot be condemned by the process of calling it a threat; the employer is not restricted to pleasant facts....Respondent's failure to state the full sequence, viz., that some employees had been replaced and not recalled, and its summary form that they had 'lost their jobs' is not significant.

598 F. 2d at 672.

In the instant case, petitioner provided a complete, accurate description of the consequences of a strike which the Union had threatened at the bsrgaining table. Petitioner was merely reporting to the employees in a permissible, non-coercive manner what had transpired at the negotiation sessions in an exercise of its right of free speech. The court of appeals' finding that petitioner engaged in an unfair labor practice directly conflicts with the above-cited cases as well as with this Court's consistent protection of the employer's freedom of speech as guaranteed by the First Amendment and the NLRA § 8 (c).[2/] NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969).

2/ 29 U.S.C. § 158 (c)

3. THE DECISION BELOW IS GROSSLY ERRONEOUS RESULTING IN A MISCARRIAGE OF JUSTICE WHICH HAS THE POTENTIAL TO AFFECT A SIGNIFICANT PORTION OF THE POPULATION.

The court of appeals' statement that substantial evidence supported the Administrative Law Judge's finding that Peat threatened to discharge strikers is erroneous. The substantiality of the evidence is measured by the consideration of all of the evidence and not just that which supports the Board's findings. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The "substantial evidence" referred to by the court of appeals consists of the isolated comments of one Spanish-speaking witness about a matter not in issue, and which was not pursued further at the hearing precisely for that reason. Moreover, an examination of the record would show that the great weight of the evidence, as well as logic, dictates a contrary conclusion.

The result of the court of appeals' judgment is that a grave injustice has been suffered by Peat's employees, and the decision is apt to have continuing adverse consequences for the bulk of the population which comprises this nation's work force. The decision has effectively denied Peat's employees the right to associate (or not to associate) freely with a union as guaranteed by the NLRA § 7 (29 U.S.C. § 157). The court of appeals' mandate ordered petitioner to bargain with a union which has twice been disavowed by a majority of the employees. The employees, who clearly desire to be free from union representation, have had their collective voice effectively silenced by the court of appeals. The petitioner, who listened to its employees and unlawfully refused to bargain with a union which lacked majority support, is being unfairly censured. These are the people that the NLRA was designed to protect, yet that very statute is now unfairly

being used to suppress them. To force them to retain union representation in the face of substantial evidence of their disaffection is a harsh and inequitable result.

The Administrative Law Judge reached his conclusion that petitioner engaged in unfair labor practices without any legal, evidentiary or logical support. The Board then "short-form" adopted his decision, which was, in turn, adopted by the court, in toto, without evidencing any study of the record itself which does not support these findings. The court of appeals appears to have deferred to the Board's so-called "expertise" in this matter, nullifying the right of the employees to freely choose whether they wish to have a bargaining representative and rendering the right of appeal nugatory. This sets a harmful precedent.

The harshness of the bargaining order imposed is exemplified by the Court of

Appeals for the Ninth Circuit's decision in NLRB v. Four Winds Industries, Inc., 530 F. 2d 75 (9th Cir. 1976). In that case, the court refused to uphold the Board's bargaining order even though the employer had threatened the employees with job loss if the union won the election, a direct conflict with that same court's judgment in the instant case. Petitioner herein submits that the record and case law does not support the finding that any violations of the NLRA occurred. However, even assuming, arguendo, that a threat to discharge strikers did occur, this would have merely been a technical de minimus violation, the effect of which would have been dispelled and dissipated one month later when the first petition was circulated and certainly three months later when the second petition was circulated. Thus, there would have been no impact whatsoever on the employees' choice to be rid of the Union. The imposition of a bargaining order, the most

severe remedy imposed in these cases, has resulted in overriding the twice expressed will of the majority to deprive the employees of their constitutional and statutory rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. PEAT MANUFACTURING COMPANY, Respondent.	)	No. 80-7755
	)	MEMORANDUM

On Application for Enforcement of an Order of the National Labor Relations Board

(Submitted February 2, 1982)

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH,* Senior District Judge.

The NLRB applies for enforcement of its order that Peat Manufacturing Company (Peat) cease interference with the employees' exercise of their statutory rights and bargain collectively with the union. Peat cross-petitions for review. We enforce the order.

During the summer of 1978, Peat held meetings with its employees to explain the

EXHIBIT "1"

App. 1

progress of contract negotiations. Peat emphasized the benefits it was offering, but stated that if would never agree to the union's demand for check-off and union shop clauses. Peat explained that it wished its employees to have free choice. Peat also said that if its employees went on strike, they would be permanently replaced.

Two decertification petitions were circulated during that summer. The first was rejected by the NLRB because it fell within the one-year election bar period. The second was given directly to Peat, who promptly withdrew recognition of the union and ceased negotiations. Peat then unilaterally increased wages and instituted other benefits.

Based on this conduct, the ALJ found that Peat had violated § 8(a)(1) and 8(a)(5) by refusing to bargain with the union in good faith and bargaining directly with employees; and by threatening to discharge

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* Of the Eastern District of Missouri.

employees. Because Peat engaged in unfair labor practices during the negotiations, it could not rely on the decertification petitions to justify withdrawal of recognition of the union.

Substantial evidence supports the ALJ's findings that Peat threatened to discharge strikers. In this context, it was not error for the Board to find the threat coercive: "We look not for certain words that are allowed and others that are forbidden. Rather, we are to view the statements in their entirety and consider their total effect on the receiver." NLRB v. Four Winds Industries, Inc., 530 F. 2d 75, 78 (9th Cir. 1976).

The finding that Peat engaged in direct bargaining is also supported by substantial evidence. Peat's employees could conclude from its statements that Peat, rather than the union, was the protector of their interests.

Substantial evidence also supports the ALJ's determination that employee Taylor was coercively interrogated regarding his union activities. Peat attacks this finding primarily on credibility grounds, but does not show that a clear preponderance of the evidence negates the credibility determination. NLRB v. Carilli, 648 F. 2d 1206, 1211 (9th Cir. 1981).

Having acted to cause disaffection from the union, Peat could not rely on the decertification petitions as indicative of the lack of union support. Clear Pine Moldings v. NLRB, 632 F. 2d 721, 730 (9th Cir. 1980). Peat's argument that a bargaining order is inappropriate given the decertification petitions is meritless.

A bargaining order is the usual remedy for a company's refusal to bargain with an already authorized employee representative when the employer's refusal to bargain follows its campaign to undermine the union. The Board did not abuse its dis-

cretion when it determined that a bargaining order was necessary to restore the status quo.

The assertion that a variance between charges and proof deprived Peat of due process also fails. Peat argues that the complaint charged only coercive statements it may have made in September, not in June as found by the ALJ.

The NLRB may find an unfair labor practice when the issue has been fully litigated even though no specific charge was ever made or amended to the complaint. NLRB v. Carilli, 648 F. 2d 1206, 1211 (9th Cir. 1981). The June statements were raised on direct examination of Peat's witness, and it had full opportunity to explore the issue.

ORDER ENFORCED.

JPT

251 NLRB No. 153

D--6798
Norwalk, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEAT MANUFACTURING COMPANY

and

Case 21-CA-17094

PRODUCE, REFRIGERATED & PROCESSED FOODS & INDUSTRIAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On April 17, 1980, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

EXHIBIT "2"

The Board has considered the record and the attached Decision in light of the exceptions and briefs [1] and has decided to affirm the rulings, findings, [2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein. [4]

ORDER

The order of the National Labor Relations Board is the same as the order contained in the Judgment of the Court of Appeals for the Ninth Circuit, Exhibit "3" herein.

1/ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

2/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined

the record and find no basis for reversing his findings.

In sec. IV of his Decision, the Administrative Law Judge concluded that Respondent violated Sec. 8(a)(1) of the Act by bargaining directly with its unit employees. However, in his Conclusion of Law 6 he found, and we agree, that such conduct was violative of Sec. 8(a)(5) and (1).

3/ Respondent excepts to the Administrative Law Judge's conclusion that it violated Sec. 8(a)(1) of the Act in June 1978 by threatening employees with discharge if they engaged in a strike on the ground that such a violation was not alleged in the complaint. We find this exception without merit. Although the complaint did not specifically allege such a violation, the issue was fully litigated at the hearing and the record fully supports the Administrative Law Judge's conclusion. Furthermore, the violation found is closely related to the violations alleged in the complaint. Accordingly, we adopt the Administrative Law Judge's finding of this violation. See Savoy Faucet Co., Inc. d/b/a Savoy Brass Manufacturing Company, 241 NLRB No. 7, fn. 2 (1979).

4/ The Administrative Law Judge concluded, and we agree, that Respondent violated Sec. 8(a) (5) and (1) of the Act by unilaterally granting benefits to unit employees after unlawfully withdrawing recognition from the Union. To remedy this violation, the Administrative Law Judge recommended, inter alia, that, at the request of the Union, Respondent reinstate any terms of employment which existed at the time that it unlawfully withdrew recognition. We shall modify the recommended Order to specify that nothing therein shall be construed as requiring the

rescission of any of the benefits granted to unit employees

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. PEAT MANUFACTURING COMPANY, Respondent.	)	No. 80-7755

JUDGMENT

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH,* Senior District Judge.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated August 27, 1980, against Respondent, Peat Manufacturing Company, Norwalk, California, it's officers, agents, successors, and assigns. The Court heard argument of respective counsel on February 2, 1982, and has considered the briefs and transcript of

EXHIBIT "3"

record filed in this cause. On February 16, 1982, the Court being fully advised in the premises, issued its memorandum granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Peat Manufacturing Company, Norwalk, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees who engage in strikes, engaging in direct bargaining with employees, interrogating employees concerning their union activities and sympathies, and threatening employees for engaging in union activities.

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*/ Of the Eastern District of Missouri.

(b) Refusing to bargain collectively with Produce, Regrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), as the exclusive bargaining representative of all employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision.

(c) Bargaining directly with employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision.

(d) Changing wage rates and other terms and conditions of employment of the employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision, without prior notification to and bargaining with the Union as the collective-bargaining

representative of the employees in that bargaining unit.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees employed in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision respecting rates of pay, wages, hours, or other terms and conditions of employment and, should any understandings be reached, embody such understandings in a signed agreement.

(b) Upon request by the Union, reinstate any terms of employment existing when recognition was withdrawn from that labor organization as the bargaining representative of the employees in the unit found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision, and make whole those employees for any loss of benefits which would have accrued to them but for the changes in the terms of their employment following the withdrawal of recognition, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy" (a copy of which is attached hereto as Appendix A); provided, however, that nothing herein shall be construed as requiring rescission of any wage increases or benefits which previously have been granted to unit employees.

(c) Preserve and make available to the Board or its agents all payroll and

other records necessary to compute the back-pay set forth in "The Remedy" section of the Administrative Law Judge's Decision.

(d) Post at its Norwalk, California facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 21 of the National Labor Relations Board (Los Angeles, California), after being duly signed by its authorized representative, shall be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps Peat Manufacturing Company has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

/s/ PHILIP B. WINBERRY
PHILIP WINBERRY
Clerk

/s/ EUGENE A. WRIGHT
EUGENE A. WRIGHT, CJ

/A TRUE COPY,

/s/ BETTY B. FLETCHER
BETTY B. FLETCHER, CJ

ATTEST:

/s/ JAMES H. MEREDITH
JAMES H. MEREDITH, DJ

PHILIP WINBERRY
Clerk/

A TRUE COPY
ATTEST APR 22 1982
PHILLIP B. WINBERRY
Clerk of Court
by: Chas. Sagle
Deputy Clerk

APPENDIX A

THE REMEDY

Having found that Peat Manufacturing Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that certain affirmative action be taken to effectuate the policies of the Act. With regard to the latter, I shall recommend that Peat Manufacturing Company be ordered to resume recognizing and bargaining with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of the employees in the appropriate unit described in Conclusions of Law No. 4, supra, and, further, that Peat Manufacturing Company be ordered to reinstate, upon request by Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the terms of

employment existing before the changes made following Peat Manufacturing Company's unlawful withdrawal of recognition, making whole the employees, with interest, for any losses of benefits that they may have sustained as a result of those changes. See, Republic Engraving and Designing Company, A Division of Nutter, Inc., and Swift Graphics, A Division of Congdon & Crome, 236 NLRB 1150, 1157 (1978), and cases cited therein.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization.

To form, join, or assist any union.

To bargain collectively through representatives of their own choice.

To engage in activities together for the purpose of collective

bargaining or other mutual aid or protection.

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten to discharge you for engaging in strikes.

WE WILL NOT interrogate you concerning you union activities and sympathies.

WE WILL NOT threaten you for engaging in union activities.

WE WILL NOT refuse to bargain collectively with Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all employees in the following appropriate bargaining unit:

All production and maintenance employees including trainees, inspectors, plant clerical employees,

janitors, shipping and receiving employees, truckdrivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL NOT change rates and other terms and conditions of employment of employees in the above-described bargaining unit, without prior notification to and bargaining with the above-named labor organization.

WE WILL NOT offer to bargain nor bargain directly with employees in the above-described bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed

you by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees in the above-described bargaining unit, respecting rates of pay, wages, hours of employment, and other terms and conditions of employment and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request by the above-named labor organization, reinstate any terms of employment existing prior to the time that we unlawfully withdrew recognition from it as a bargaining representative of the employees in the above-described appropriate bargaining unit, and WE WILL make you whole for any loss of benefits that you may have sustained by virtue of those changes. However, nothing herein shall be construed as requiring rescission of any wage increases or benefits which

previously have been granted to our unit employees.

PEAT MANUFACTURING COMPANY

(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 S. Olive Street, Los Angeles, California 90014, Telephone 213--688--5229.

FILED

APRIL 13, 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner, vs. PEAT MANUFACTURING COMPANY, Respondent.	No. 80-7755 O R D E R

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH, Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Fletcher have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35 (b).

EXHIBIT "4"

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

NATIONAL LABOR RELATIONS BOARD
REGION 21
City National Bank Building
24th Floor
606 South Olive Street
Los Angeles, California 90014
Telephone: 688-5204

November 22, 1978

George A. Pappy, Esq.
Pappy, Kaplon & Vogel
1730 West Olympic Boulevard
Los Angeles, California 90015

Re: Peat Mfg. Co.
Case No. 21-CA-17094

Dear Mr. Pappy:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. There is insufficient evidence to show that the Employer unlawfully withdrew recognition of the Charg-

EXHIBIT "5"

ing Party. Rather it appears that the Employer withdrew recognition following expiration of the certification year based on a good-faith belief that a majority of its unit employees no longer wished to be represented by the Charging Party. I am, therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on December 5, 1978. Upon good cause shown, however, the General

Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me. If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties.... The notice forms should be mailed the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Wilford W. Johansen
Regional Director